

## Osborn, Mary E (OAH)

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**From:** Cooley, Nathan (MPCA)  
**Sent:** Wednesday, September 26, 2012 2:45 PM  
**To:** Cervantes, Manuel (OAH); \*OAH\_RuleComments.OAH  
**Cc:** Thornton, J. David (MPCA); Kohlasch, Frank (MPCA); Fenske, MaryJean (MPCA); Conti, Barbara J (MPCA); Richfield, David (MPCA); Beeman, Michelle (MPCA)  
**Subject:** Rebuttal of Comments on GHG Air Emission Permits  
**Attachments:** Rebuttal of Comments for GHG rules on e-Letterhead.docx

Dear Judge Cervantes:

Attached, please find the Minnesota Pollution Control Agency's final letter rebutting timely comments received in response to rules proposed to permit generators of greenhouse gases emitted above a certain threshold.

The attached rebuttal letter is the Agency's final rebuttal in an iterative process that included responding to comments on the dual notice and to questions received during the August 30, 2012 hearing; providing written response/rebuttal in a September 19, 2012 post-hearing letter; and now responding to additional timely comments received post-hearing.

The Agency found that the post-hearing comments do not raise new issues and were consistent with comments that the Agency previously addressed in hearing testimony or in its September 19, 2012 letter. Please consider all prior rebuttal discussion and documentation in addition to the attached letter with limited rebuttal to post-hearing comments as constituting the Agency's overall rebuttal.

The Agency appreciates your diligence and looks forward to the earliest possible resolution.

Sincerely,

***Nathan Brooks Cooley***

Rules Coordinator

651-757-2290 v

651-297-8676 x



Minnesota Pollution Control Agency



## Minnesota Pollution Control Agency

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September 26, 2012

The Honorable Manuel J. Cervantes  
Administrative Law Judge  
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Saint Paul, MN 55164-0620  
[rulecomments@state.mn.us](mailto:rulecomments@state.mn.us)  
Fax: 651-361-7936

RE: Minnesota Pollution Control Agency Rebuttal of Post-Hearing Comments for Greenhouse Gas  
Emission Permitting Rules

On September 19, 2012, the Minnesota Pollution Control Agency (MPCA or Agency) submitted post-hearing comments for its Greenhouse Gas (GHG) emission permitting rules. In its post-hearing comments, the Agency proposed one minor rule revision, which it had previously described at the August 30, 2012, hearing on the rules. The Agency also reviewed the standards of review specified in Minnesota Rules, part 1400.2100 and summarized how it met each of the standards.

After the close of the post-hearing comment period on September 19, 2012, at 4:30 p.m., the Office of Administrative Hearings (OAH) posted timely comments it had received. The Agency has reviewed these post-hearing comments and believes that they do not raise new issues, but are consistent with comments that the Agency already addressed during the hearing or in its September 19, 2012, post-hearing submittal. As a result, the Agency affirms its reliance on its Statement of Need and Reasonableness, the evidence it presented at the August 30, 2012, hearing and its post-hearing submittal. The Agency offers the following limited rebuttal to the post-hearing comments:

**Comments that changed and now support the Agency's proposed rules:**

Xcel Energy originally commented that it needed a longer application deadline and that it opposed changes the Agency intended to clarify who must appear on a permit. After attending the hearing, Xcel Energy changed its original position in part based on the Agency agreeing to provide a longer application deadline. Xcel also adds new comments agreeing with the permitting thresholds in the proposed rules that are consistent with those of the EPA, and disagreeing with hearing testimony about lowering those thresholds for reasons of practicability, costs to small emitters required to be permitted, and economic competitiveness with other states.

The Minnesota Chamber of Commerce had originally submitted comments similar to those of Xcel, and now similarly supports the proposed minor change in the application deadline as well as supporting the Agency's proposed permitting thresholds. It also agrees with the Agency that the proposed Greenhouse Gas permitting rules and the Minnesota Next Generation Energy Act have different purposes and therefore do not need to perfectly align. Finally the Chamber agrees that the Agency has adequately justified the scope of its proposed rules in its Statement of Need and Reasonableness (SONAR).

**Comments for which the Agency reiterates its support of rules as currently proposed:**

**[ISSUE] Proper Notice:** The Agency provided proper notice of these rules and of the hearing as required under the Minnesota Administrative Procedures Act. The notices were adequate to allow any interested person the ability to participate meaningfully in the proposed rulemaking. The Agency submitted into the record a request for comments dated August 28, 2011, and a dual notice according to the requirements of Minnesota Rules, part 1400.2540 (which included the time and place of the scheduled hearing) which it published and delivered to about 1,380 self-subscribed email recipients on July 9, 2012, 32-days prior to close of the public notice period on August 10<sup>th</sup>, and 52-days in advance of the hearing held on August 30, 2012. While not possible to anticipate levels of interest, or to accommodate all possible timing needs, the Agency hosted the hearing as prescribed in the dual notice and Judge Cervantes provided the maximum time of 20-days to submit written post-hearing comments. The Agency followed standard requirements to notify the Governor's office and key legislative leaders in proposing these rules.

**[ISSUE] The Rules Are Needed and Reasonable:** The Agency's basic needs are to make its air permitting program consistent with the federal air permitting program, and to clarify in existing rules who must appear on an air permit. The Agency has stated this consistently in its request for comments, in its dual notice and in its SONAR. Rulemaking is the best and most reasonable means for the Agency to address these objectives.

In considering thresholds other than 100 TPY (the existing threshold) and 100,000 TPY (the new federal threshold tailored to apply specifically to GHG emission sources), the Agency relied on the work done by U.S. EPA in its rule on the same subject as the Agency's proposed rule. The Agency believes it is both necessary and reasonable to rely on the comprehensive federal process. The federal process assessed the cost/benefit of various GHG thresholds and considered several hundred thousand comments received in response to proposed thresholds. Ultimately, U.S. EPA decided that 100,000 TPY for GHG was the most appropriate threshold to use in the final federal regulation.

The Agency adopted pertinent documentation from the federal regulatory proceedings into its SONAR. The Agency provides additional discussion under the heading of "Permit threshold and costs" that begins on page 3 of its September 19, 2012 comment submittal letter.

Therefore, the Agency did not ignore the possibility of other thresholds, but chose to rely on the U.S. EPA's research and analysis on the question.

**[ISSUE] Alignment with Other Statutory Requirements.** Some commenters believe that this proposed rule must align with existing statutory requirements on similar topics. The statutes the commenters cite to, however, while concerned with similar subjects, are not statutes that address or are intended to address the threshold at which sources of GHGs sources should be required to obtain air emissions permits, nor do they require the Minnesota Pollution Control Agency (MPCA) to undertake rulemaking to implement them. Specifically, commenters identified the following statutes:

Next Generation Energy Act (Minnesota Statutes, § 216H.02, subdivision 1): This statute was discussed at the August 30, 2012, hearing. This statute establishes greenhouse gas reduction goals for the state of Minnesota. It identifies the Department of Commerce and the MPCA as the agencies with primary authority for implementation. The MPCA's authorities under the Next Generation Energy Act focus on

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GHG emission estimation and reporting on statewide progress in relation to the emission reduction goals. The Next Generation Energy Act does not impose affirmative duties on the MPCA to require specific GHG emission reductions at individual facilities and therefore is not reasonably related to the MPCA's authority provided in Minnesota Statutes, § 116.07, subd. 4a, to issue permits to control air emissions. The statute does not address the subject of air emissions permitting thresholds.

Sustainable Buildings 2030. The Minnesota Legislature directed the Department of Administration and the Department of Commerce to develop sustainable building design guidelines for all new state buildings by January 15, 2003, and for all major renovations of state buildings by February 1, 2009 (Minnesota Statutes, § 16B.325). Except for state-bonded buildings, this is a voluntary program. This statute does not impose affirmative duties on the MPCA or require the MPCA to undertake rulemaking.

Energy Conservation and Renewable Energy (Minnesota Statutes, § § 216C.05 – 216C.053): The statute sets forth conservation and renewable energy goals for the state of Minnesota. The Department of Commerce is charged with encouraging the deployment of cost-effective renewable energy developments within the state. As with the Next Generation Energy Act and the Sustainable Building 2030 statute, this statute does not address GHG permitting thresholds and does not impose any affirmative duties on the MPCA or require the MPCA to engage in rulemaking to implement it.

Use carbon cap or carbon marketplace: The proposed rules were not intended to and do not cap emissions of GHGs. The MPCA understands that the commenters' have an interest in urging government to take affirmative steps to curb the emission of GHGs, however a carbon cap or carbon marketplace system is outside the scope of the notice for this rulemaking and is generally outside the scope of air permits.

The Agency continues to offer the rules as originally proposed with the one minor change previously described and relies on its Statement of Need and Reasonableness (SONAR), its notices and its post-hearing submittals, including this rebuttal letter to support adoption of the proposed rules.

Please contact me at 651-757-2290 or Barbara Conti at 651-757-2288 if you have any questions.

Sincerely,

Nathan Brooks Cooley  
Rules Coordinator  
SSTS, Land Treatment, and Rules Section  
Municipal Division

NBC:wgp